

IN THE SUPREME COURT OF OHIO

ORIGINAL

MARK W. JENNEY)	Case No. 2009-1069
)	
Appellant)	
)	On Appeal from the Summit
vs.)	County Court of Appeals
)	Ninth Appellate District
)	
CITY OF BARBERTON)	Court of Appeals
)	Case No. 24423
Appellee)	

REPLY BRIEF OF APPELLANT
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LAW AND ARGUMENT

Proposition of Law

A police officer's unaided visual estimation of a vehicle's speed is not sufficient by itself to make out a case for violation of R.C. 4511.21, or to support a conviction under that statute.

Appellee City of Barberton's brief says that appellant has "mischaracterized" the record. The city's brief was filed more than thirty days after Appellant Jenney filed his brief and is not properly before the Court. It is sufficient to say, therefore, in response to such contention in such a brief, that Mr. Jenney did not mischaracterize the record. Every statement in the city's brief designed to show "mischaracterization" is at best an elaboration of that which the appellant had already told this Court.

Amicus curiae, Ohio Attorney General Cordray, chides Appellant Jenney for having "skirted the issue" by (1) citing an out-of-state case for the proposition that no one can say exactly what a given speed is¹ and (2) ignoring the Ohio cases that allow estimates of speed.

As for the impossibility of estimating speed with pin-point precision, if no Ohio case states a proposition nearly as indisputable as that the sun rises in the east, and a Maryland case does, then one cites the Maryland case for that. And if some Ohio court should venture to say the sun does indeed rise in the west, then a person is well advised to go with the out-of-state court. The truth is, though, that courts everywhere have ever called them "estimates" of speed.

As for the second matter, that of ignoring the Ohio cases, Appellant Jenney did not skirt the issue. He faced it head-on. He asked for a change in the law.

¹ *Baltimore & Ohio Railroad Co. v. Wright* (1951), 198 Md. 555, 84 A.2d 851.

The Ohio cases cited by the Attorney General trace their lineage to a time when the speed limit was only a *prima facie* speed limit. A speed greater than the posted limit could be lawful, depending upon conditions. And depending upon conditions, a speed less than the posted limit could be required. No pin-point calculation of speed was required.

That is why the courts have called them – and still do – visual “estimations” of speed. All the state had to prove was that someone was going too fast for conditions.

The Attorney General highlights the decision in *State v. Auerbach* (1923), 108 Ohio St. 96, as a strong foundational case for the admissibility of speed estimates in Ohio. The brief points out that the defendant there was convicted of a serious offense, manslaughter, based only upon opinion testimony as to his speed. (The driver in *Auerbach* case made a turn at an intersection and killed a pedestrian in the crosswalk.)

The statute violated in that case was Section 12603 of the General Code,² the predecessor to R.C. 4511.21. It provided for a *prima facie* speed limit only. A lawful speed was one that was reasonable for conditions.

The test prescribed by Section 12603, General Code, to determine the lawfulness or unlawfulness of speed of motor vehicles upon the public highway is whether such speed is greater or less than is reasonable or proper under existing conditions.

Swoboda v. Brown (1935), 129 Ohio St. 512, paragraph five of the syllabus.

This for many years was also the test under R.C. 4511.21.³ The posted speed was a *prima facie* limit only.

² A copy of Section 12603 of the General Code is attached as Appx. p. 1.

³ A copy of former R.C. 4511.21 is attached at Appx. pp. 2-3.

In a prosecution under Section 4511.21, Revised Code, for speeding, the gist of the offense is whether the speed in question is greater or less than is reasonable and proper, having due regard to the traffic, surface, and width of the highway and any other existing conditions.

State v. Wall (1962), 115 Ohio App. 323, paragraph one of the syllabus.

In fact, an affidavit or traffic ticket which did not charge that the speed was unreasonable for conditions did not "state an offense under a municipal ordinance which is identical to Section 4511.21, Revised Code." *Willoughby v. Hugebeck* (1964), 2 Ohio App.2d 36, syllabus.

As explained in *State v. Wall, supra*,⁴ the General Assembly dropped fixed speed limits in 1919 and had not reinstated them forty-three years later, when *State v. Wall* was decided. It was not until 1975, with the enactment of 136 v H 632, that the legislature incorporated a fixed speed limit into R.C. 4511.21.

R.C. 4511.21(D) now makes exact speed an issue. "A violation of R.C. 4511.21(D) constitutes a *per se* violation." *State v. Hamad*, 2009-Ohio-3562 at ¶10. This leaves no room for guess-work or approximation. A violation of R.C. 4511.21(D) occurs when a motorist drives one mile per hour over a posted speed limit.

This Court should hold that an unaided visual observation is not sufficient. An officer pacing a vehicle is one thing. An officer standing at the side of the road is another. At the very least, there should be something to independently verify the opinion. How long was the car observed and/or for what distance? Were there other vehicles? What about a simple count as the vehicle traverses a known distance between intersections or mile markers?

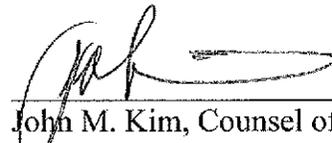
⁴ At pages 332-335 of the opinion.

Years ago officers used stopwatches. Now they have laser and radar devices. The law requires accuracy now. Technology provides it. Why resort to approximations? No other experts are afforded such *carte blanche*.

CONCLUSION

The Supreme Court should reverse the judgment of the Ninth District Court of Appeals.

Respectfully submitted,



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MARK W. JENNEY

Certificate of Service

I certify that a copy of this Reply Brief was sent by ordinary U.S. mail to counsel for appellee, Michelle Banbury, Assistant Prosecutor, 576 W. Park Avenue, Barberton, Ohio 44203, and to Benjamin C. Mizer, counsel of record for the Ohio Attorney General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, this 22nd day of December, 2009.



John M. Kim, Counsel of Record
COUNSEL FOR APPELLANT
MARK W. JENNEY

§ 12601

FELONIES AND MISDEMEANORS

terminated by rule or regulation adopted and promulgated by the board of building standards as provided in this act [G. C. §§ 12600-284 to 12600-299].

HISTORY.—110 v. 350 (566), § 10.

* G.C. §§ 12579 to 12591 were repealed in 113 v. 685 (687), § 1.

MACHINERY AND BOILERS

SEC. 12601. Covert for water wheels. Whoever, being the owner or operator of a mill or other manufacturing establishment near a public highway, fails to build or maintain a covert for a water or other wheel exposed to view and attached to such mill or establishment, shall be fined not more than fifty dollars, and be liable in damages to any person injured in person or property in consequence of the fright or alarm of an animal from the action of such wheel. (R. S. Sec. 7009.)

HISTORY.—R. S. § 7000; 40 v. 65, 381, 2; S. & C. 860.

SEC. 12602. Putting soap, alkali, etc., into boilers and wells. Whoever maliciously puts soap, alkali, or other material which will tend to interfere with or render unusually dangerous the generating of steam, into a steam boiler, tank, well, cistern, pipe, hose or other receptacle where such soap, alkali or other material is liable to be drawn or pumped into a steam boiler or generator, with intent to injure or damage another person, or to delay or retard the running of an engine, locomotive or machine, shall be imprisoned in the penitentiary not less than one year nor more than ten years or fined not less than one hundred dollars nor more than five hundred dollars. (R. S. Sec. 6874.)

HISTORY.—R. S. § 6874; 71 v. 116, § 1.

FORM: Charge. Patterson § 12602.

MOTOR VEHICLES

Registration of motor vehicles passing on highway, etc., G.C. § 8290 et seq.

SEC. 12603. [Speed of motor vehicles.] No person shall operate a motor vehicle in and upon the public roads and highways at a speed greater or less than is reasonable or proper, having due regard to the traffic, surface and width of the road or highway and of any other conditions then existing, and no person shall drive any motor vehicle in and upon any public road or highway at a greater speed than will permit him to bring it to a stop within the assured clear distance ahead.

It shall be prima facie lawful for the operator of a motor vehicle to drive the same at a speed not exceeding the following:

Twenty miles per hour when passing a school building or the grounds thereof during school recess and while children are going to or leaving school during the opening or closing hours.

Twenty miles per hour in the business portions of a municipal corporation.

Twenty-five miles per hour in all other portions of a municipal corporation, except on state routes and on main thoroughfares.

Thirty-five miles per hour on state routes and main thoroughfares within municipalities outside business portions.

Forty-five miles per hour on highways outside of municipal corporations.

It shall be prima facie unlawful for any person to exceed any of the foregoing speed limitations. In every charge of violation of this section the complaint, also the summons or notice to appear, shall specify the speed at which the defendant is alleged to have driven, also the speed, if any, which this section declares shall be prima facie lawful at the time and place of such alleged violation.

Any person who violates the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined as hereinafter provided.

HISTORY.—99 v. 541, § 14; 99 v. 542, § 25; 105 v. 161; 105 v. Pt. 1 471; 110 v. 125 (158); 113 v. 231; 117 v. H. 127, § 1. BH. S-13-37.

See G.C. § 12603-2 which refers to G.C. §§ 12601, 12603-1.

Comparative legislation

Speed limits:

- Idaho Code 1932, § 48-504.
Ill. Smith-Hurd Rev. Stat. 1933, ch. 96, § 146 et seq.
Ind. Burns' Stat. 1932, § 47-516.
Iowa Code 1931, §§ 5029, 5030.
Ky. Carroll's Stat. 1932, § 2729g-61.
La. Dart's Stat. 1932, § 6205 et seq.
Mass. Gen. Laws 1932, ch. 90, § 17.
Mich. Comp. Laws 1929, § 4697.
N.Y. Cahill's Consol. Laws, ch. 64-a, § 56.
Penna. Purdon's Stat. 1926, title 76, § 591.
Tenn. Williams' Ann. Code, § 2682.
Utah Rev. Stat. 1933, § 57-7-6 et seq.
W.Va. Code 1937, § 1546.

References to Page's Digest and Ohio Jurisprudence

- Criminal offenses and prosecutions: PAGE Motor Veh. § 132 et seq.; O-JUR Automobiles § 258 et seq.
Indictment, information or complaint: PAGE Motor Veh. § 133; O-JUR Automobiles § 259.
Evidence admissible: PAGE Motor Veh. § 134; O-JUR Automobiles §§ 256, 257.
Trial, judgment and sentence: PAGE Motor Veh. § 135; O-JUR Automobiles § 258.
Control, regulation and use in general: PAGE Motor Veh. § 7; O-JUR Automobiles § 144 et seq.
Excessive speed and racing—civil liability: PAGE Motor Veh. §§ 7, 33, 34; O-JUR Automobiles § 61a et seq., Carriera § 917.
Violation of statute as negligence per se: PAGE Motor Veh. § 74, Negligence §§ 12, 13; O-JUR Automobiles §§ 3, 62, Negligence § 28.
Evidence: PAGE Motor Veh. §§ 33, 224; O-JUR Automobiles § 217, Evidence § 260.
Questions for jury; instructions: PAGE Motor Veh. §§ 96, 113; O-JUR Automobiles § 234 et seq., Trial § 289.

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§ 4511.20.1

TITLE 45: MOTOR VEHICLES

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grounds and the driveways thereon are not streets or highways within the contemplation of this section: *State v. Bundy*, 79 OLA 253, 154 NE(2d) 924 (MC).

22. The term "streets or highways," as used in this section, does not include private roads and streets: 1949 OAG No.1073.

§ 4511.20.1] § 4511.201 Reckless operation off streets and highways; competitive operation.

No person shall operate a vehicle, trackless trolley, or streetcar on any public or private property other than streets or highways, without due regard for the safety of persons or property.

This section does not apply to the competitive operation of vehicles on public or private property when the owner of such property knowingly permits such operation thereon.

HISTORY: 129 v 1637, § 1 (Eff 10-2-61); 182 v 8 170, § 1. Eff 12-18-67.

Cross-References to Related Sections

Penalty, RC § 4511.99(D).

See RC §§ 4511.18, 4511.18.1 which refer to this section.

Forms

OJI

Instructions to jury—reckless operation: lookout and control. Vol. 2, No. 225.20

Research Aids

O-Jur2d: Autos §§ 64, 108, 485, 490, 492
Am-Jur2d: Autos §§ 263-271

ALR

Liability of owner or operator of parking lot for personal injuries caused by movement of vehicles. 38 ALR3d 138.

CASE NOTES AND OAG

1. The phrase "without due regard," as used in this section, means that the operator of a vehicle on public or private property other than streets or highways must operate such vehicle in the same manner as would a reasonably prudent person under similar circumstances: *Hadecki v. Lammers*, 15 OS(2d) 101, 44 OO(2d) 76, 238 NE(2d) 545.

[SPEED REGULATIONS]

§ 4511.21 Speed limits.

No person shall operate a motor vehicle, trackless trolley, or streetcar in and upon the streets and highways at a speed greater or less than is reasonable or proper, having due regard to the traffic, surface, and width of the street or highway and any other conditions, and no person shall drive any motor vehicle, trackless trolley, or streetcar in and upon any street or highway at a greater speed than will permit him to bring it to a stop within the assured clear distance ahead.

It is prima-facie lawful for the operator of a motor vehicle, trackless trolley, or streetcar to

operate the same at a speed not exceeding the following:

(A) Twenty miles per hour when passing a school building or the grounds thereof during school recess and while children are going to or leaving school during the opening or closing hours, and when appropriate signs giving notice of the existence of the school are erected; except, that on controlled-access highways and expressways, if the right of way line fence has been erected without pedestrian opening, the speed shall be governed by division (D) of this section and on freeways, if the right of way line fence has been erected without pedestrian opening, the speed shall be governed by divisions (H) and (I) of this section;

(B) Twenty-five miles per hour in all other portions of a municipal corporation, except on state routes, through highways outside business districts, and alleys;

(C) Thirty-five miles per hour on all state routes or through highways within municipal corporations outside business districts, except as provided in divisions (D) and (F) of this section;

(D) Fifty miles per hour on controlled-access highways and expressways within municipal corporations;

(E) Sixty miles per hour during the daytime and fifty miles per hour during the nighttime on highways outside of municipal corporations except fifty miles per hour at all times for operators of trucks and commercial tractors weighing in excess of four thousand pounds empty weight, school buses, streetcars, and trackless trolleys; As used in this section "nighttime" means any time when lighted lights are required by section 4513.03 of the Revised Code. "Daytime" means any other time.

(F) Fifty miles per hour on state routes within municipal corporations outside urban districts, unless a lower prima-facie speed is established as further provided in this section;

(G) Fifteen miles per hour on all alleys within the municipal corporation;

(H) Sixty miles per hour at all times on freeways with paved shoulders inside municipal corporations except fifty miles per hour at all times for operators of trucks and commercial tractors weighing in excess of four thousand pounds empty weight and school busses;

(I) Seventy miles per hour at all times on freeways outside municipal corporations except fifty-five miles per hour for operators of trucks and commercial tractors weighing in excess of four thousand pounds empty and school buses.

It is prima-facie unlawful for any person to exceed any of the speed limitations in sections 4511.01 to 4511.78 and 4511.99 of the Revised Code. In every charge of violation of this sec-

tion the affidavit and warrant shall specify the time, place, and speed at which the defendant is alleged to have driven, and also the speed which this section declares is prima-facie lawful at the time and place of such alleged violation, except that in affidavits where a person is alleged to have driven at a greater speed than will permit him to bring the vehicle to a stop within the assured clear distance ahead the affidavit and warrant need not specify the speed at which the defendant is alleged to have driven.

Whenever the director of transportation determines upon the basis of an engineering and traffic investigation that any prima-facie speed set forth in divisions (A) to (I) of this section is greater or less than is reasonable or safe under the conditions found to exist at any intersection or other place upon any part of a state route, the director shall determine and declare a reasonable and safe prima-facie speed limit, which shall be effective when appropriate signs giving notice are erected at the intersection or other part of the state route.

Whenever local authorities determine upon the basis of an engineering and traffic investigation that the prima-facie speed permitted under sections 4511.01 to 4511.78 and 4511.99 of the Revised Code, on any part of a highway under their jurisdiction is greater than is reasonable and safe under the conditions found to exist at such location, the local authorities may by resolution request the director to determine and declare a reasonable and safe prima-facie speed limit. Upon receipt of such request the director may determine and declare a reasonable and safe prima-facie speed limit at such location, and if the director alters the prima-facie speed limit, then such altered speed limit shall become effective only when appropriate signs giving notice thereof are erected at such location by the local authorities. The director may withdraw his declaration of any altered prima-facie speed limit whenever in his opinion any altered prima-facie speed becomes unreasonable, and upon such withdrawal the altered prima-facie speed shall become ineffective, and the signs relating thereto shall be immediately removed by the local authorities.

Local authorities in their respective jurisdictions may authorize by ordinance higher prima-facie speeds than those stated in this section upon through highways, or upon highways or portions thereof where there are no intersections, or between widely spaced intersections, provided signs are erected giving notice of the authorized speed, but local authorities shall not modify or alter the basic rule set forth in the first paragraph of this section or in any event authorize by ordinance a speed in excess of fifty miles per hour.

Alteration of prima-facie limits on state routes by local authorities shall not be effective until the alteration has been approved by the director. The director may withdraw his approval of any altered prima-facie speed limits whenever in his opinion any altered prima-facie speed becomes unreasonable, and upon such withdrawal the altered prima-facie speed shall become ineffective, and the signs relating thereto shall be immediately removed by the local authorities.

HISTORY: GC § 6307-21; 119 v 766(775), § 21; 124 v 514(520), § 1; 124 v 118, § 1 (ER 10-1-56); 127 v 931, § 1 (ER 9-14-57); 128 v 1270(1274), § 1 (ER 11-4-59); 130 v 1083, § 1 (ER 9-30-63); 130 v P12, H 5, § 1 (ER 12-16-64); 135 v H 200, ER 9-23-73. Analogous to former GC §§ 7249 and 12603.

Cross-References to Related Sections

Penalty, RC § 4511.99(D).
Turnpike commission rules and regulations, RC § 5537.16.

See RC §§ 4511.09.1, 4511.22, 4511.24, 4511.25, and 4511.99(D) which refer to this section.

Forms

OJI

Instructions to jury—assured clear distance; speed.
Vol. 2, Nos. 225.21.1 to 225.21.3

Research Aids

O-Jur2d: Autos §§ 84, 125, 127, 130-135, 459, 500

Am-Jur2d: Autos §§ 180-193

ALR

Construction, application, and effect, in civil motor vehicle cases, of statutes prohibiting driving at such a slow speed as to create danger, to impede normal traffic movement, etc. 66 ALR2d 1194.

Necessity and propriety of instruction as to prima facie speed limit. 87 ALR2d 539.

Proof, by radar or photographic devices, of violation of speed regulations. 49 ALR2d 469.

Law Review

Application of assured clear distance statute. (Case note.) 21 OO 156, 7 OSLJ 468.

A survey of Ohio negligence case law—1968. Alvin C. Vinopal. 42 OBar (No.42) 1347.

Developments in the law of wanton misconduct and nuisances in relation to the assured clear distance ahead rule. Address by C. Craig Spangenberg of Cleveland. 23 OBar (No.12) 227.

Discernible objects and sudden foreshortening: judicial gloss on the Ohio assured-clear-distance-ahead statute. Editorial. 36 CinLRev 449.

Ohio ordinances in conflict with general laws. Article by J. Gareth Hitchcock of the Paulding county bar. 16 CinLRev 1.

Ohio supreme court's traffic court rules. Prof. James G. France. 1 AkronLRev (No.2) 1.

Ohio's assured clear distance rule. (Case note.) 16 WestResLRev 446.

The assured clear distance ahead rule in Ohio. (Editorial note.) 5 WestALRev 77.

The uniform traffic act is amended. (1951 Legislation.) John E. Hallea. 12 OSLJ 351.

Torts; proximate cause and per se negligence. (Case note.) 12 OBar (No.51) 768, 6 OSLJ 106.